HONG LEONG ASSURANCE BHD

v.

TEOH SEOW CHIEW

HIGH COURT MALAYA, KUALA LUMPUR
RAUF SHARIF J
[CIVIL APPEAL NO: R1-12-722-2001]
30 JANUARY 2004

INSURANCE: *Motor insurance - Loss or damage to car - Whether loss covered under the policy - Whether insured had failed to take reasonable precaution against loss or damage to motorcar*

INSURANCE: *Motor insurance - Construction of policy - Exception excluding liability for loss or damage occasioned by cheating - Insured's motorcar driven off at car-wash - Whether loss of motorcar occasioned by cheating*

The plaintiff was the registered owner of motorcar KV 7468 insured by the defendant. The policy of insurance contained an exception *inter alia* excluding liability for any loss or damage caused by cheating. The plaintiff sent his motorcar to a car-wash, surrendered the car and keys to the car-wash owner and left. When he returned later to collect his motorcar, he was told that a Malay man had driven off in his motorcar. The plaintiff lodged a police report and made a claim under the insurance policy. The defendant denied liability, claiming instead that the loss fell within the exception to the policy. The plaintiff sued. The Sessions Court held that the claim was payable by the defendant. The defendant appealed to the High Court. The issue before the High Court was whether the plaintiff's loss was covered under the policy or whether it fell within the exception to the policy. Defendant's counsel submitted *inter alia* that the plaintiff had failed to take reasonable precautions against loss or damage and/or that he was reckless.

Held (dismissing the defendant's appeal with costs):

[1] The plaintiff's act of delivering his motorcar to the car-wash was not an act of failure to take reasonable precautions against loss or damage to the motorcar. The plaintiff's act could not be termed as reckless. (p 250 e-g)

[2] The High Court would also agree with the Sessions Court that cheating was not proved in the instant case. (pp 250 g-h & 251 a-e)

Case(s) referred to:
Devco Holder v. Legal Assurance [1993] 2 Lloyd's Report 567 ***(dist)***

For the appellant - Prakash Menon (Nadarajah); M/s Isharidah
For the respondent - Siva Dharma; M/s Siva Dharma & Assocs

Reported by Andrew Christopher Simon

JUDGMENT

Rauf Sharif J:
This is an appeal by the defendant against the decision of the sessions court judge dated 28 September 2001 in allowing the plaintiff's claim made under an insurance policy.

The plaintiff was the registered owner of the motorcar No. KV 7468 ('the motorcar'). The defendant was an insurance company which insured the motorcar at all material times. In consideration of premiums of RM4,955.85 paid by the plaintiff to the defendant, the defendant issued a cover note no: VGM-019152 dated 31 October 1995 followed by a policy insurance ('the policy') to the plaintiff insuring the motorcar on the terms and conditions as set out in the policy.

On 14 March 1966, the plaintiff had sent the motorcar to a Petronas Wash ('the petrol station'), to be washed and vacuumed. He surrendered the motorcar and the keys to the owner of the car wash and left the premise and was to collect the motorcar later when it is ready. After about an hour, he returned to collect the motorcar but was told that a Malay man had taken the motorcar.

The plaintiff lodged a police report and subsequently made a claim under the policy. The defendant in letter dated 2 September 1996 denied liability. The said letter reads as follows:

> **Re: Theft of Vehicle No. KV 7468 on 14 March 1996**
>
> Having received **our adjusters report** and carefully examining their findings, we are of the view that this loss would not fall for consideration as the circumstances that led to this incident falls within the exception to section 1 of the comprehensive motor policy No. A 295AA010121.
>
> Following this, we regret we are unable to assist you in this matter.

The relevant exception to the s. 1 of the policy is as follows:

Exception To Section 1

The Company shall not be liable to pay for:

i) ... ;

ii) ... ;

iii) any loss or damage caused by or attributed to the act of cheating by any person within the meaning of the definition of the offence of cheating set out in the Penal Code. Cheating is defined in the Penal Code as whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which would not do or omit if they were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to 'cheat'.

After a full trial, the sessions court judge held that the motorcar was taken without the consent of the plaintiff and the claim is payable under the policy. It was against the said decision that the defendant is now appealling.

The issue before this court is whether the loss occasioned by the respondent is covered under the terms of the policy or did it come with the exception and if it does, whether the loss amounts to "theft" or "cheating".

The learned counsel for the defendant submitted that even though the sessions court judge had rightfully established the elements to constitute to theft but had wrongfully made findings that the loss amounted to theft since there are uncontroverted fact that the plaintiff had voluntarily surrendered the vehicle and the key to the owner of the car wash. Thus, according to him the element of dishonesty, as an essential ingredient to the crime was missing that is between the plaintiff and the owner of the car wash. He further submitted that the correct law to the facts in this case is the law of bailment which was proven by the plaintiff's act of handing over the car and the key to the owner of the car wash and he had prepaid the sum of RM10 for the services. As such, according to the defendant, the plaintiff ought to have sued the owner of the car wash and not the defendant. He also submitted that the policy imposes on the plaintiff a duty to take reasonable steps to safeguard the motor-vehicle from loss or damage and also due observers and fulfillment of the terms of the policy shall be condition precedent to any liability of the appellant to make any payment. Condition 3 and 9 of the policy states as follows:

3. The insured shall take all reasonable steps to safeguard the Motor Vehicle from loss or damage

9. The due observance and fulfillment of the Terms of the Policy ... shall be condition to any liability of the company to make payment under this Policy.

Thus, counsel for the defendant submitted that the respondent's act of surrendering the vehicle and the keys to a virtual stranger as it was the first time he had gone to the car wash and to have left the premises constitutes to the act of failure to take reasonable precaution against loss or damage of the motorcar. To support his contention, the defendant referred to the case of *Devco Holder v. Legal Assurance* [1993] 2 Lloyd's Report 567 where the English Court of Appeal held as follows:

(2) even if Mr. Rhodes under-estimated or did not contemplate the risk of theft or even if he thought his absence from the car park would only be for a very short time, a car park with its keys in the ignition was no less capable of being stolen if it was left unattended for two minutes than if it was left unattended for two hours; the learned Judge clearly reached the right conclusion and the Legal and General were entitled to rely on condition 2; the appeal would be dismissed.

With due respect, I am unable to agree with the defendant's contention. I am of the view the plaintiff's act of delivering his motorcar to a car-wash operator at the Petronas Petrol Station at Tg. Tokong, is not an act of failure to take reasonable precaution, against loss or damage to the motorcar. The plaintiff's act cannot be termed as reckless. There are no elements of the respondent deliberately courting a danger. Thus, I am unable to accept the defendant's contention that the plaintiff in this case has acted recklessly and the facts here is distinguished from the facts, in the case of *Devco Holde*r. In *Devco Holder*, the insured had recklessly left his car with the keys at the ignition and engine running leaving it unattended for 2 minutes at the park. In the instant case the plaintiff send his motorcar to Petronas Petrol Station and not to a "jagakereta" car wash.

Accordingly, I find that the respondent has not breached condition 3 and 9 of the policy. On the issue, that the loss was occasioned by an act of cheating and not theft, I need only to rely on what was stated by the sessions court judge in her grounds of judgement which are as follows:

SP1, SP2 dan SP4 di dalam keterangan-keterangan mereka dengan jelas menyatakan bahawa mereka tidak pernah membenarkan lelaki Melayu itu untuk mengambil motorkar tersebut. Mengikut SP1, pekerja beliau tidak dibenarkan untuk

mengembalikan kereta kepada pelanggan selepas dicuci. Kereta-kereta hanya boleh dikembalikan melalui SP1. Mengikutnya, lelaki Melayu itu telah merampas atau merompak kereta itu. Keterangan SP2 juga jelas menunjukkan lelaki itu telah mengambil motorkar itu tanpa keizinannya. Keterangan SP3 juga menyebut bahawa hasil siasatannya ialah motorkar itu telah diambil tanpa kebenaran SP2 dan bahawa ianya telah dicuri oleh lelaki Melayu itu. Daripada keterangan keempat-empat saksi plaintiff yang tersebut di atas, ternyatalah pada pandangan saya bahawa kelima-lima unsur penting untuk membuktikan kecurian motorkar tersebut seperti yang disebut oleh Ratanlal dan Dhirajlal's *Law of Crimes* telahpun didiscaj oleh plaintif.

The learned sessions court judge further said as follows:

Saya berpendapat fakta-fakta di dalam kes ini dan keterangan SP2 adalah jelas dan tidak menunjukkan atau membuktikan bahawa SP2 telah ditipu oleh orang Melayu yang tidak dikenali untuk memberi posesi motorkar tersebut. Pada pandangan saya, keterangan SP2 dengan jelas menunjukkan bahawa orang yang mengambil motorkar tersebut telah berbuat demikian tanpa keizinan SP2.

Saya berpendapat defendan telah gagal untuk membuktikan "cheating" oleh kerana tiada keterangan pun di dalam kes ini yang menunjukkan "cheating". Beban adalah di atas defendan untuk membuktikan "cheating" dan memandangkan polisi insuran itu menetapkan definasi "cheating" seperti yang terkandung di dalam Penal Code maka beban ini adalah berat.

I am of the view that the learned sessions court judge was right in arriving at her decision. I have no reason to disturb her findings.

In the circumstances, the defendant's appeal is hereby dismissed with costs.